

Memorandum

To: Utah Air Quality Board

From: Ernest Wessman, Hearing Officer

*EW
by
Frank G. Nelson*

Re: Recommendation to the Board, A-1 Restoration Inc. Appeal of Notice of Violation and Order to Comply, No. 053106001 dated June 1, 2006

Date: February 26, 2007

I was appointed by the Board as the hearing officer for this matter. The hearing was held on January 10, 2007, at the request of A-1 Restoration Inc. This proceeding is for the purpose of considering the appeal of a Notice of Violation and Order to Comply, No. 053106001 dated June 1, 2006, issued by the Executive Secretary to A-1 Restoration Inc. The Notice of Violation and Order to Comply found five violations of:

1. UAC R307-801-15(1) and UAC R307-214-1 incorporating 40 CFR 61.150(a) for the owners and operators failure to adequately wet, contain and transport asbestos waste without generating visible emissions to the outside air.
2. UAC R307-801-15(2) and UAC R307-214-1 incorporating 40 CFR 61.150(a)(1)(iii) for the owners and operators failure to package ACWM [meaning Asbestos Containing Waste Material] in leak-tight containers.
3. UAC R307-801-15(3) and UAC R307-214-1 incorporating 40 CFR 61.150(a)(1)(iv) for the owners and operators failure to label ACWM with generator, owner and operator, information including name, address, telephone number and project location, before transport.
4. UAC R307-801-15(4) and UAC R307-214-1 incorporating 40 CFR 61.150(b) for the owners and operators failure to dispose of ACWM in an approved landfill that properly disposes of friable asbestos.
5. UAC R307-214-1 incorporating 40 CFR 61.150(d)(1)(i) for the owners and operators failure to include the waste generator's telephone number on the asbestos waste manifest.

After hearing the testimony, and after reviewing the administrative record and documents received at the hearing, I make the following recommendations to the Board with respect to each of the five violations:

1. I recommend that only a part of Violation No 1 be upheld. Results from samples taken by Steven Beach (Administrative Record ("AR"), 4.1), photos taken by Mr. Beach (AR 4.m), and testimony of Mr. Beach concerning the condition of the warehouse and location of sampling (Transcript, pp. 4-6) support the finding that A-1 is in violation of UAC R307-801-15(1) by failing to contain "asbestos waste", as defined in R307-801-3. A-1 argues the sampling results indicate that the levels of asbestos in the samples did not exceed the 1% threshold in the definition of "Asbestos Containing Material" in R307-801-3 because the samples should be analyzed as composite samples. A-1 also argues that since the percentage is below 10%, a point count is required. There is no evidence that a point count was done. Testimony of A-1 employees and the DEQ inspector established that A-1 does bring, on occasion, to the warehouse

asbestos waste for storage pending shipment for disposal (Transcript pp 4-5, 8, 15-16, 64). The asbestos waste is from projects subject to regulation because the projects have "asbestos containing material". The definition of "asbestos waste" in R307-801-3, however, includes not only "asbestos containing material", but more broadly would include "materials contaminated with asbestos", within which the concentration of asbestos might be lower than the threshold to be classified as asbestos containing material. The broader definition is necessary to ensure that the intent of the asbestos regulations is not defeated by a removal organization diluting asbestos containing material to the point that it would escape regulation, by mixing in other materials that do not contain asbestos. Therefore, even though the samples may not have demonstrated levels of asbestos that meet the definition of "asbestos containing material," they still contained asbestos and therefore must be handled in accordance with the asbestos regulations. The percent of asbestos criteria for asbestos containing material does not need to be demonstrated for materials to be "asbestos waste", so the fact that the samples were not composite is not determinative. I would note that my conclusion is based on the assumption that a point count is not necessary to confirm whether or not the samples contained asbestos; in other words, I have assumed that a point count is not necessary to satisfy a yes/no determination of the presence of asbestos. Mr. Beach testified of seeing white materials on the ground in locations inside and outside the warehouse (Transcript p 5). He sampled those materials. Of the three samples taken, two were contaminated with asbestos (AR 4.1). The evidence supports the conclusion that the samples were "asbestos waste". The photos, sample results, and testimony of Mr. Beach support the conclusion that asbestos waste that was not contained was at the warehouse. Failure to contain asbestos waste at the warehouse is evidenced by this presence of loose asbestos at the facility.

Notice of violation finding No 1 also stated a violation of UAC R307-214-1 incorporating 40 CFR 61.150(a) for "generating visible emissions to the outside air." No evidence was presented of visible emissions, therefore, I recommend this part of finding No. 1 should not be upheld.

A-1 also argued that there are other businesses using the warehouse and that it was not established who was responsible for the bags and materials in the warehouse. Mr. Matt Hernandez testified three business entities use the warehouse, A-1, Accelerated Design and Construction, and Chester Goodman. Mr. Hernandez testified he is the sole owner of A-1. He also testified he is a part owner with his son and former wife of Accelerated Design and Construction. He is also an officer of Accelerated Design. He further testified that Chester Goodman pays him \$100 a month to use the warehouse. He also testified that only A-1 has the license and certification to handle asbestos waste. Mr. Hernandez indicated he was not aware of Accelerated Design or Mr. Goodman having brought asbestos waste to the warehouse (Transcript pp 71-73). It is concluded based on these facts that A-1 is responsible for any asbestos waste at the warehouse.

2. I recommend that Violation No 2 not be upheld. The finding of violation of UAC R307-801-15(2) and UAC R307-214-1 incorporating 40 CFR 61.150(a)(1)(iii) is based on testimony of Mr. Greg Sorenson that during an August 26, 2005, inspection he observed a leaking asbestos waste bag. No samples were taken and the video taken at the time of the inspection did not show a leaking bag (AR 11). No mention was made of a leaking bag on the Inspection Notice (AR 4b). A-1 employees testified that they observed no leaking bags (Transcript pp 64, 68). I conclude that the violation has not been established by a preponderance of the evidence.

3. I recommend that Violation No 3 be upheld. The testimony of Mr. Greg Sorenson is that on August 26, 2005, he observed bags at the warehouse that were not labeled as required by UAC R307-801-15(3) and UAC R3078-214-1 incorporating 40 CFR 61.150(a)(1)(iv) (Transcript p 16). The video taken at the time also supports that testimony (AR 11). A-1 presented testimony that the bags were from the "Draper" site, a regulated project, and that they were labeled at the site, but the labeling blew off during transport to the warehouse (Transcript p 64). A-1 admits that some of the bags did not have labels at the warehouse and the testimony and video are evidence that A-1 labeled the bags prior to the end of the inspection of Greg Sorenson on August 26, 2005. The number of unlabeled bags at the warehouse is not consistent with the method that Cameron Hernandez said he used to affix the labels (Transcript pp 64-66), because properly applied spray adhesive on both label and bag, when the bags are clean and dry, should result in virtually 100% of the labels remaining attached. The testimony of Cameron Hernandez is inconsistent with widespread industry experience with affixing labels. The evidence supports the conclusion that even if the bags were labeled at the Draper site, they were not adequately and properly labeled and thereafter not properly managed and that constitutes a failure to label. A-1 has a duty to properly (including the requirement to securely) label all bags at the work site and maintain strict control of all bags until disposed, which is not possible if the bags are not securely labeled. For whatever reason, Mr. Sorenson observed unlabeled bags which constitutes a violation of the rules.

Further, from the testimony of Mr. Beach and photos taken by Mr. Beach, there appeared to be asbestos bags at the warehouse on August 18, 2005, which were not labeled (AR 4.m, photos 2-5). A-1 presented testimony that the bags on the site on August 18, 2005, were from the unregulated Arbor project (evidence in the Administrative Record included a report from A-1 showing it was not a regulated project (AR 4.f.1 and 4.f.2)) and that two employees of another company, Accelerated Design and Construction (see discussion above of relationship of A-1 and Accelerated Design), had improperly used asbestos bags at the Arbor project for ceiling insulation that did not contain asbestos (Transcript pp 52, 73). The photos taken by Mr. Beach show some asbestos bags that appear to have ceiling insulation, but also show other asbestos bags that are not labeled that appear to contain materials other than ceiling insulation. I consider it the burden of the company licensed to handle asbestos waste to demonstrate that filled asbestos bags under its control do not contain asbestos wastes, especially in view of the results of sampling by Mr. Beach. I do not consider A-1 has met its burden of proof with only the oral testimony that unlabeled asbestos bags in the warehouse on August 18, 2005 were from the Arbor project (Transcript p 73), in light of the sampling results of Mr. Beach and the photos of unlabeled bags that contained other than ceiling insulation.

4. I recommend that violation No. 4 not be upheld. The violation was based on Mr. Greg Sorenson's observation of the Pheasant Hollow Business Park project, and the manifest for the project (AR 4h). He concluded that UAC R307-801-15(4) and UAC R307-214-1 incorporating 40 CFR 61.150(b) had been violated because asbestos waste appeared to be not properly disposed of in an approved landfill. Mr. Matt Hernandez and his employee testified that all asbestos wastes from the Pheasant Hollow project were put in 187 bags and all bags were placed in a trailer in North Salt Lake and then taken to ECDC by All Services Inc (Transcript pp 63, 69-71). Mr. Matt Hernandez testified that the notation on the manifest of "6 yds" had been placed on the manifest by All Services and not by himself, and that 187 bags constituted considerably

more than "6 yds" based on the size of the bags he used (50 in x 33 in) (Transcript p 69). Mr. Sorenson's testimony was based on his assumptions and speculation and not on specific evidence. Therefore, I conclude that the staff has not met its burden of proof to establish violation No. 4. It was noted that the present form of the manifest document does not result in a clear trail of accountability and unambiguous record of amount of material generated and transferred to the transporting organization, including separate sections for the generator and transporter to fill out, date and sign, listing the cubic yards and number of bags of waste involved in each custody transfer. It is recommended that the manifest form be modified to correct this problem and to ensure that full traceability of all material is maintained all the way from the removal site to the final waste disposal site.

5. I recommend that violation No. 5 be upheld. Mr. Matt Hernandez admitted that the waste generator's telephone number was not on the two asbestos waste manifests (AR 4.h and 4.i) as required by UCA R307-214-1 incorporating 40 CFR 61.150(d)(1)(i) (Transcript p 75). He testified that the forms he used had been obtained from ECDC and the forms did not include a line for a waste generator telephone number, and that since the notice of violation, he has been writing the telephone number on the form below the address as required by the rule (Transcript p 75). This violation does not appear to warrant a significant penalty under the penalty policy. It is recommended that the manifest form be revised to add a space for the waste generator's telephone number to be inserted.